

ESTABLISHING A UNIFORM CODE OF MILITARY JUSTICE

JUNE 10 (legislative day, JUNE 2), 1949.—Ordered to be printed

Mr. KEFAUVER, from the Committee on Armed Services, submitted the following

REPORT

[To accompany H. R. 4080]

The Committee on Armed Services, to whom was referred the bill (H. R. 4080) to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice, having considered the same, report favorably thereon with an amendment, and recommend that the bill, as amended, do pass.

AMENDMENT TO THE BILL

Strike out all after the enacting clause and insert in lieu thereof that printed in italics, in the bill as reported.

PURPOSE OF THE BILL

The purpose of the bill is to establish a Uniform Code of Military Justice. By its terms, the proposed Code is uniformly applicable in all of its parts to the Army, the Navy, the Air Force, and the Coast Guard in time of war and peace. It covers both the substantive and the procedural law governing military justice and its administration in all of the armed forces of the United States. If adopted, it will supersede the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard and will be the sole statutory authority for:

- (1) The infliction of limited disciplinary penalties for minor offenses without judicial action;
- (2) The establishment of pretrial and trial procedure;
- (3) The creation and constitution of three classes of courts martial corresponding to those now in existence;
- (4) The eligibility of members of each of the courts and the qualifications of its officers and counsel;

(5) The review of findings and sentence and the creation and constitution of the reviewing tribunals; and

(6) The listing and definition of offenses, redrafted and rephrased in modern legislative language.

The code, while based on the Revised Articles of War and the Articles for the Government of the Navy, is a consolidation and a complete recodification of the present statutes. Under it, personnel of the armed forces, regardless of the Department in which they serve, will be subject to the same law and will be tried in accordance with the same procedures. The provisions of section 1 of the bill will provide, for the first time in the history of this Nation, a single law for the administration of military justice in the armed forces.

Among the provisions designed to secure uniformity are the following:

(1) The offenses made punishable by the code are identical for all the armed forces;

(2) The same system of courts with the same limits of jurisdiction of each court is set up in all the armed forces;

(3) The procedure for general courts martial is identical as to institution of charges, pretrial investigation, action by the convening authority, review by the Board of Review, and review by the Court of Military Appeals in all the armed forces;

(4) The rules of procedure at the trial including modes of proof are equally applicable to all the armed forces;

(5) The Judge Advocates General of the three Departments are required to make uniform rules of procedure for the Boards of review in each Department;

(6) The required qualifications for members of the court, law officer, and counsel are identical for all of the armed forces;

(7) The Court of Military Appeals, which finally decides questions of law, is the court of last resort for each of the armed forces and also acts with the Judge Advocates General of the three Departments as an advisory body with a view to securing uniformity in policy and in sentences and in discovering and remedying defects in the system and its administration.

Among the provisions designed to insure a fair trial are the following

General courts martial

(1) A pretrial investigation is provided, at which the accused is entitled to be present with counsel to cross-examine available witnesses against him and to present evidence in his own behalf.

(2) A prohibition against referring any charge for trial which does not state an offense or is not shown to be supported by sufficient evidence.

(3) A mandatory provision for a competent, legally trained counsel at the trial for both the prosecution and the defense.

(4) A prohibition against compelling self-incrimination.

(5) Provision for equal process to accused and prosecution for obtaining witnesses and depositions and a provision allowing only the accused to use depositions in a capital case.

(6) A provision giving an accused enlisted man the privilege of having enlisted men as members of the court trying his case.

(7) A provision whereby voting on challenges, findings, and sentences is by secret ballot of the members of the court.

(8) A provision requiring the law officer to instruct the court on the record concerning the elements of the offense, presumption of innocence, and the burden of proof.

(9) A provision for an automatic review of the trial record for errors of law and of fact by a board of review with the right of the accused to be represented by legally competent counsel.

(10) A prohibition against receiving pleas of guilty in capital cases.

(11) A provision for the review of the record for errors of law by the Court of Military Appeals. This review is automatic in cases where the sentence is death or involves a general or flag rank officer. A review may be requested by petition on the part of the accused in any sentence involving confinement of 1 year or more.

Special and summary courts martial

Under present law and procedure there is great variation in the nomenclature, composition, procedure, and powers of the intermediate military courts. This bill completely eradicates all of those differences and establishes complete uniformity.

The foregoing constitutes a general summary of the provisions of this bill. The proposed code is presented in 15 sections and is further subdivided into 11 parts. Part 1 contains general provisions. Part 2 contains all of the provisions relating to apprehension and restraint. Part 3 pertains to nonjudicial punishment. Part 4 sets forth the jurisdiction of courts martial. Part 5 prescribes the manner of appointment and composition of courts martial. Part 6 prescribes pre-trial procedure. Part 7 prescribes trial procedure. Part 8 relates to sentences by courts martial. Part 9 prescribes the provisions for appellate review. Part 10 sets forth and defines the punitive articles. Part 11 contains miscellaneous provisions. Section 1 of the bill contains 140 articles. These articles embrace all of the provisions of the proposed Uniform Code of Military Justice. The 14 remaining sections relate to the subject of military justice but are not germane to a Uniform Code of Military Justice and are, therefore, excluded from section 1 of the bill.

DISCUSSION OF THE BILL

At the conclusion of World War II, there was considerable discussion and criticism of the justice systems of the Army and the Navy which at that time embraced all the military services. As a result of this criticism both departments created several independent boards and committees to review wartime courts-martial cases and also to study their court-martial systems. Many eminent members of the bar served on these committees and as a result of their studies both the War Department and the Navy Department submitted separate bills for introduction early in the Eightieth Congress revising their systems of military justice. The House of Representatives after lengthy hearings passed the bill, H. R. 2575, revising the Army courts-martial system but no hearings were held on a companion bill in the Senate.

During the first session of the Eightieth Congress the National Security Act of 1947 was enacted, unifying the armed services and creating a separate Department of the Air Force. Since the proposed revisions of the Army and the Navy justice systems differed in many respects, and in order to avoid having a third distinct system established by the Air Force, the then chairman of the Senate Armed

Services Committee suggested to the Secretary of Defense that a bill be prepared for introduction early in the Eighty-first Congress which would provide a uniform system of courts-martial for all the military services.

Toward the end of the Eightieth Congress, the bill revising the Army courts-martial system, as passed by the House of Representatives, was included as an amendment to the Selective Service Act of 1948, during the debate in the Senate on the bill, and subsequently became Public Law 759, Eightieth Congress.

In July of 1948, Secretary of Defense Forrester appointed a special committee to draft a Uniform Code of Military Justice, uniform in substance and uniform in interpretation and construction, to be equally applicable to all of the armed forces. Prof. Edmund Morgan, Jr., of the Harvard Law School was designated chairman, the remainder of the committee being Assistant Secretary of the Army Gordon Gray, Under Secretary of the Navy John Kenney, and Assistant Secretary of the Air Force Eugene Zukert. Supplementing the efforts of the main committee was a working group of approximately 15 persons, including officer representatives of each of the services and 5 civilian lawyers with service experience, under the chairmanship of Mr. Felix Larkin, assistant general counsel in the Office of the Secretary of Defense.

During the 7-month study which was conducted, the Morgan committee and the working group considered the Revised Articles of War, the Articles for the Government of the Navy, the Federal Code, the penal codes of various States, and voluminous reports on military and naval justice which have been made in recent years by various distinguished persons. The end result of this combined effort was S. 857, a bill to provide a Uniform Code of Military Justice, and companion bill to H. R. 4080, as amended and passed by the House of Representatives.

A subcommittee of the Armed Services Committee held extensive hearings on this bill, at which time representatives of the Morgan Committee, veterans' associations, bar associations, Reserve officers associations, the Judge Advocate Generals of the armed services, and other qualified witnesses appeared.

The differences of opinion of those who appeared before the committee or made known their views by other means pointed for the most part to the provisions of the bill discussed below. These differences were carefully considered by the committee and, where desirable, changes have been made.

Article 2, subdivision 1, provides the general jurisdiction of the Uniform Code over persons in the regular components of the armed services, including volunteers, inductees, and Reservists called into Federal service. In order to leave no doubt as to the point where an inductee will be subject to the code, this subsection is now consistent with the Selective Service Act of 1948 to provide that jurisdiction will not be obtained over those who attempt to avoid selection or induction. Jurisdiction over these persons will continue to reside in the Federal courts.

Subdivision 3, article 2, was objected to by Reserve associations on the ground that it would be used to subject Reserves to the code when they are engaged in all types of inactive duty training. Although the committee has made no change in this subdivision, it

desires to express the view that military departments should issue orders subjecting Reserves to the code only when they are engaged in inactive duty training involving the use of dangerous or expensive equipment.

Article 3 provides a continuing jurisdiction over certain persons who have left the service and who heretofore have been immune from prosecution. Under this section, however, such persons are subject to this code, whenever the Federal courts do not have jurisdiction, and when the offense is serious enough to call for at least 5 years' sentence and was committed within the statute of limitations.

Article 15 provides for commanding officers' nonjudicial punishment and combines the present practices of mast punishment in the Navy and Coast Guard and the disciplinary punishment imposed by commanding officers in the Army and Air Force. This punishment consists of withholding of privileges, restriction to specified limits, forfeiture of limited amounts of pay, and is not imposed pursuant to trial by court martial, but enables commanders to impose limited punishments for disciplinary purposes. In the past, the punishments authorized have differed in the Army, Navy, and Air Force. The Army and Air Force have never used confinement, or confinement with bread and water, as a disciplinary punishment, while such punishments are traditional in the Navy and Coast Guard. This bill limits, as a disciplinary punishment imposed by commanding officers, confinement to 7 days and confinement with bread and water to 3 days, and this punishment can only be used when the recipient is attached to or embarked on a vessel.

The composition of the three types of courts martial is provided in articles 22, 23, and 24. These articles continue, in general, present procedures now in effect in all services and provide for the appointment of the members of the courts and counsel, the convening of the courts and the referral of charges by the President, Secretaries of Departments, and certain commanding officers. A number of witnesses, principally representing bar associations, urged the amendment of these articles to provide a different method of selection of court members. It was conceded that the commanding officers should retain the right to refer the charges for trial, select the trial counsel, and review the case after trial. It was contended, however, that the authority to appoint the court presented the opportunity to the commander to influence the verdict of the court. It was proposed that members of a court be selected by a staff judge advocate from a panel of eligible officers and enlisted men made available by commanding officers.

Departmental witnesses opposed these amendments and supported the present method of selecting court members on the ground that the military has a legitimate concern with military justice and the responsibility for operating it, and that it is not inappropriate for the President, the Secretaries of the Departments, or selected commanding officers to appoint the members of a court. It is their position that to have the court members selected by judge advocates from among panels of eligibles submitted by the commanders is impracticable and unwieldy, would hamper the utilization of persons on the panels or normal military antics, and could not operate efficiently in time of war. A number of added protections not found in either the Articles of War or the Articles for the Government of the Navy are

included in this bill, such as a supreme civilian court of military appeals boards of review removed from the commander, and provisions that the law officer, trial and defense counsel of a general court must be trained lawyers. Further, the influencing of the action of a court by any authority becomes a crime for which the offender is subject to trial by court martial under this bill. With these safeguards, the committee adopted the provisions recommended by the National Military Establishment.

Article 26 provides the authority for a law officer of a general court martial. Under existing law the Navy has no law officer. The Army and the Air Force do have a law officer for general courts martial who, in addition to ruling upon points of evidence, retires, deliberates, and votes with the court on the findings and sentence. Officers of equal experience on this subject are sharply divided in their opinion as to whether the law officer should retire with the court and vote as a member. In view of the fact that the law officer is empowered to make final rulings on all interlocutory questions of law, except on a motion to dismiss and a motion relating to the accused's sanity, and under this bill will instruct the court upon the presumption of innocence, burden of proof, and elements of the offense, it is not considered desirable that the law officer should have the voting privileges of a member of the court. This is consistent with the practice in civil courts where the judge does not retire and deliberate with the jury.

Article 67 of the Uniform Code provides for a court of military appeals, which is an entirely new concept in the field of military law. This court, composed of three civilians, appointed by the President and confirmed by and with the advice and consent of the Senate, will be the supreme authority on the law and assure uniform interpretation of substantive and procedural law. The committee believed it desirable to have the judges of the court of military appeals serve for a term of 8 years rather than hold office during good behavior. Provision is made for staggering the expiration of terms of the judges.

Under the provisions of Public Law 759, Eightieth Congress, a separate Judge Advocate General's Corps was established for the Army. No such separate legal corps exists for the Navy or the Air Force. The Secretaries of the Navy and the Air Force oppose the creation of a separate legal corps within their departments at this time. Since the legal corps in the Department of the Army has been in operation only since February 1, 1949, and the advantages of such a corps are speculative, it is believed desirable to postpone the creation of separate legal corps within the Air Force and the Navy until further experience is available on the operation of the corps in the Army. The operation of this Code will not be hampered by lack of uniformity in this respect. Restrictive qualifications are included with respect to the appointment of future judge advocate generals of the military departments.

SECTION BY SECTION ANALYSIS OF THE BILL

SECTION 1

Article 1. Definitions

The definitions in this article pertain only to this code. In the interest of economy of draftsmanship certain words, such as "The Judge Advocate General", have been given special meanings.

For the purpose of this code, the Marine Corps and, when operating as part of the Navy, the Coast Guard are considered part of the naval armed forces. The term "armed force" includes all components.

A provision as to masculine and feminine gender is unnecessary in light of 1 U. S. C., section 1.

Article 2. Persons subject to the code

Paragraph (1) is an adaptation of AW 2 (a) and is consistent with section 12 of the Selective Service Act of 1948 which provides:

No person shall be tried by court martial in any case arising under this title unless such person has been actually inducted for training and service prescribed under this title * * *.

Paragraph (2) is an adaptation of AW 2 (b). See article 1 for definitions of "cadet" and "midshipman".

Paragraph (3) is adapted from 34 U. S. C., section 855. It makes the code applicable to a person on inactive duty training, but only if he has voluntarily undertaken the training after notice that he will be subject to the code. This paragraph is intended to afford control over persons on inactive duty training involving the use of dangerous or expensive equipment—such as week-end flight training.

Paragraph (4) retains existing jurisdiction over retired personnel of a Regular component who are entitled to receive pay. It is based on 10 U. S. C., section 1023 and 34 U. S. C., sections 389 and 853d.

Paragraph (5) represents a lessening of jurisdiction over retired personnel of a Reserve component. Under existing law, the Navy retains jurisdiction over retired Reserve personnel since such personnel are on the same retired list as members of a Regular component. The Army has no such jurisdiction since retirement benefits for non-Regular officers are administered by the Veterans' Administration. This paragraph relinquishes jurisdiction over its Reserve personnel except when they are receiving hospitalization from an armed force. This standardizes jurisdiction of the armed forces over Reserve personnel.

Paragraph (6) perpetuates existing law. See 34 U. S. C., section 853d.

Paragraph (7) is a slight modification of AW (2) (e). It follows article 5 (a) of the proposed revision of the Articles for the Government of the Navy by limiting applicability to those persons who are in the custody of the armed forces.

Paragraph (8) is based on 33 U. S. C., section 855 and 42 U. S. C., section 217. It provides jurisdiction over certain groups when such groups are serving with the armed forces.

Paragraph (9) is consistent with articles 45 and 64 of the Geneva Convention on Prisoners of War, 47 Stat. 2046, 2052 (July 27, 1929), in that the prisoners of war are subject to this code and thereby have the same right of appeal as members of the armed forces.

Paragraph (10) is taken from AW 2 (d). The phrase "in the field" has been construed to refer to any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted. (See *In re Berue*, 54 F. Supp. 252, 255 (S. D. Ohio 1944).)

Paragraphs (11) and (12) are adapted from 34 U. S. C., section 1201, but are applicable in time of peace as well as war. Both paragraphs, however, have been made subject to the provisions of any treaty or agreement to which the United States is a party or to an accepted

rule of international law. Paragraph (11) is somewhat broader in scope than AW 2 (d) in that the code is made applicable to persons employed by or accompanying the armed forces as well as those serving with or accompanying the armed forces, and the territorial limitations during peacetime have been reduced to include territories where a civil court system is not readily available.

Personnel of the Coast Guard are subject to this code at all times as members of an armed force. Under existing law, Coast Guard personnel, when serving with the Navy, are subject to the Articles for the Government of the Navy. When not serving with the Navy, Coast Guard personnel are subject to the disciplinary code of the Coast Guard for minor offenses and to trial in the Federal courts for more serious offenses. This is not a desirable arrangement. Under this bill, the Coast Guard, when not serving with the Navy, will conduct its own courts-martial for all types of offenses in accordance with the provisions of this code. When serving with the Navy, Coast Guard personnel will be tried under the provisions of this code by the Navy.

Article 3. Jurisdiction to try certain personnel

Subdivision (a) represents a House amendment to the bill as originally introduced. Under existing law, the armed forces lose jurisdiction over military personnel who have been lawfully separated from service. This fact has been clearly established in the recent Federal court decision in the Hershberg case. Inasmuch as the Hershberg case involved an offense which was committed beyond the jurisdiction of our State and Federal courts, there is no tribunal which has any jurisdiction over the person or the offense. It is clearly apparent that some persons can escape trial by court martial by the mere lawful termination of service. This is not a desirable situation. On the other hand, it is desirable to place some limitations on continuing jurisdiction over persons who commit offenses while subject to military law and who terminate their military status before apprehension. In the opinion of the committee the present provisions of this subdivision provide a desirable degree of continuing jurisdiction and at the same time place sufficient limitations on the continuing jurisdiction to prevent capricious actions on the part of military authorities.

Subdivision (b) is the statutory expression of the law as set out in the Manual for Courts Martial, paragraph 10, and Naval Courts and Boards, section 334. It differs from a similar provision in article 5 (a) of the proposed amendments to the Articles for the Government of the Navy in that it provides that a person who obtains a fraudulent discharge is not subject to this code for offenses committed during the period between the date of the fraudulent discharge and subsequent apprehension for trial by military authorities.

Subdivision (c) is prompted by *Ex parte Drainier* (65 F. Supp. 410 (ND Cal. 1946)), which held that a discharge from the naval service barred prosecution of a person for desertion from the Marine Corps prior to his enlistment in the Navy.

Article 4. Dismissed officer's right to trial by court martial

This article should be read in conjunction with the provisions being reenacted in section 10 of this bill. The right to trial will apply only in the case of a summary dismissal by order of the President in time

of war (sec. 10 of this bill covers the provisions now found in AW 118 and AGN, art. 36).

If the President fails to convene a court martial where there has been an application for trial, or if the court martial convened does not adjudge dismissal or death as a sentence, the procedure followed will be the same as that prescribed in article 75 (d), where a previously executed sentence of dismissal is not sustained on a new trial. This changes present statutory provisions. The change is made because of the doubt, expressed by Winthrop and other authorities on military law, as to the constitutionality of the present provision declaring that an order of dismissal, lawfully issued by the President, shall be void under certain circumstances. Under the proposed provision, it will be possible to achieve the same result—that of restoring the officer.

No time limit has been set on when an application for trial must be submitted. The present statutory provision has been construed to require that the application be made within a reasonable time, which will vary according to circumstances. (See Winthrop, *Military Law and Precedents*, 1920 ed., p. 64; *Digest of Opinions*, Judge Advocate General of the Army, 1912-40, sec. 227.)

References: AGN, article 37; R. S., section 1230 (1875), 10 U. S. C., section 573 (1946).

Article 5. Territorial applicability of the code

This article reenacts the present Army provision. It is not in conflict with the provisions in article 2 (11) and article 2 (12) of this code, which makes certain persons subject to the code only when they are outside the United States and also outside certain areas. The code is applicable in all places as to other persons subject to it. Previous restrictive provisions on this subject and the Articles for the Government of the Navy have given rise to jurisdictional problems which this language will correct.

Article 6. Judge advocates and legal officers

Subdivisions (a) and (b) are derived from AW 47a. There are no similar provisions in present Navy law. Subdivision (a) differs from AW 47a in order to make clear that the Judge Advocate General will not actually issue orders assigning judge advocates or law specialists but that the appropriate personnel divisions of the respective services will issue such orders in accordance with the recommendations of the Judge Advocate General.

The purpose of subdivision (a) is to place judge advocates and law specialists under the control of the Judge Advocate General. Subdivision (b) not only authorizes direct communication within military justice channels, but also enhances the position of staff judge advocates and law specialists by requiring direct communication between such officers and their commanding officers.

Subdivision (c), which is based on the sixth proviso of AW 11, is designed to secure review by an impartial staff judge advocate or legal officer.

Article 7. Apprehension

This article should be read in conjunction with articles 8-14, which codify and enact present practice as to apprehension and restraint of persons subject to the code.

Subdivisions (a) and (b) are new and relate in particular to military police. Subdivision (c) is derived from AW 68 and Naval Justice, chapter 6.

Article 8. Apprehension of deserters

This article, giving the authority to civil officers to apprehend military deserters, is derived from AW 106, 35 Stat. 622 (1909), and 34 U. S. C., section 1011 (1946).

Article 9. Imposition of restraint

Subdivision (a) clarifies the meaning of certain terms used by the armed forces. In present Army and Air Force practice, "arrest" refers both to apprehension and to a type of restraint. In Navy practice, "close arrest" would fall within the definition of confinement. Subdivisions (b), (c), and (d) incorporate present Army and Navy practice. (See art. 97 for offense of unlawful detention.)

Subdivision (e) is included to provide for custody of persons apprehended until proper authority is notified.

Article 10. Restraint of persons charged with offenses

This article is derived from AW 69 and 70, and conforms to present naval practice. It provides the basis and degree for arrest or confinement of persons subject to this code. The provision as to notification of the accused is new.

Article 11. Reports and receiving of prisoners

This article is derived from AW 71 and 72. (See arts. 95-97 dealing with restraint.)

Article 12. Confinement with enemy prisoners prohibited

Present AW 16 could be interpreted to prohibit the confinement of members of the armed forces in a brig or building which contains prisoners of war. Such construction would prohibit putting naval personnel in the brig of a ship if the brig contained prisoners from an enemy vessel, even though segregation within the brig were provided. This article is intended to permit confinement within the same confinement facilities, but would require segregation.

Article 13. Punishment prohibited before trial

This article is derived from AW 16. The reference to article 57 clarifies the relation of this article to the effective date of sentences. AW 16 has been interpreted to prohibit the enforcement of any sentence until after final approval, even though the accused is in confinement after the sentence is adjudged. It is felt that a person who has been sentenced by a court martial and is in confinement which counts against the sentence should not draw full pay for the period between the date of sentence and the date of final approval.

The provision as to the rigor of restraint is derived from present Army and Navy practice. The article also preserves authority to punish for infractions of discipline.

References: AW 16, MCM, paragraph 19, and Naval Justice, page 78.

Article 14. Delivery of offenders to civil authorities

Subdivision (a) perpetuates present Navy practice. The present Army practice was adopted at a time when the Army did not have authority to try its personnel for civil offenses in time of peace, so

that if a man were not delivered up he would not be tried at all. Since the armed forces now have such authority, the mandatory feature of AW 74 is felt to be unnecessary. Under the Navy practice, which has worked very satisfactorily, the Secretary of the Navy has given broad authority to commanding officers to effect delivery of enlisted personnel to civil authorities without reference to the Navy Department. (See Alnav 145, June 26, 1947.)

Subdivision (b) adopts present Army practice.

Attention is invited to the provisions in appendix C, Naval Courts and Boards, which deal with the procedure for delivering offenders, and related matters. It is contemplated that these matters will be governed by uniform regulations for the armed forces.

Article 15. Commanding officer's nonjudicial punishment

This article is a combination and revision of AW 104 and article 14 of the proposed amendments to the Articles for the Government of the Navy. The punishments authorized by these two provisions are combined in subdivision (a), while subdivision (b) empowers the Secretary of the Department to place limitations on their imposition. As originally drawn, this article would have permitted confinement for not to exceed 7 days or confinement on bread and water or diminished rations for not to exceed five consecutive days as punishment for disciplinary offenses. The House amended subdivision (a) (2) (E) (F) to prevent the imposition of these punishments except upon persons attached to or embarked in a vessel. This committee recognizes that the nature of naval operations at sea makes these punishments desirable in such circumstances, but it has added a further limitation by reducing the period of confinement on bread and water from 5 to 3 days.

Subdivision (b) also empowers the Secretary of the Department to permit members of the armed forces to elect trial by court martial in lieu of proceedings under this article. This recognizes a difference in present practice among the armed forces. The Navy allows no election on the theory that the commanding officer's punishment relates entirely to discipline, not crime; furthermore, in the Navy the officer who has summary court-martial jurisdiction is the same officer who imposes punishment under this article, or his subordinate. Therefore, to grant an option to naval personnel would be meaningless where the commanding officer was also the summary court officer. In the event the commanding officer were not the summary court officer, it would result in granting a subordinate officer the authority to pass judgment upon his superior. This is not a desirable situation and has resulted in the revision of this subdivision which will permit the Secretary of the Navy to handle this situation by appropriate regulations. In the Army, on the other hand, a company commander with power under this article will not usually have summary court-martial jurisdiction. Almost without exception a summary court officer in the Army or Air Force will be superior in rank to the officer who adjudges disciplinary punishment.

Subdivision (c) permits the Secretary of a Department to authorize officers in charge to impose certain punishments under this article. The status and authority of officers in charge differs according to the command of which they are in charge, and likewise differs between the Navy and the Coast Guard. An "officer in charge" in the Navy is always a commissioned officer, usually in command of a small, isolated detachment. An "officer in charge" in the Coast Guard is construed

to include noncommissioned officers as well as commissioned officers. The committee is fully cognizant of this difference, and it is intended that the Coast Guard shall have full authority to extend limited disciplinary authority under this article to noncommissioned officers under appropriate circumstances.

Subdivision (d) incorporates and strengthens the provision of AW 104 as to appeal and review. It is to be noted that any person punished under authority of this article may appeal to the next superior authority. This includes persons of all of the services. Appeals are to be promptly forwarded and decided. In addition, reviewing authorities are permitted not only to remit the unexecuted portion of the punishment, but also to restore all rights adversely affected by the punishment previously executed. This subdivision is new to the Navy and the Coast Guard.

Subdivision (e) is derived from AW 104. Under present Navy practice, punishment by a commanding officer is never a bar to trial by court martial, although evidence of such punishment may be introduced in mitigation of a court-martial sentence which stems from the same offense. For the difference between a minor offense and a serious crime see the Manual for Courts Martial, paragraph 118.

Article 16. Courts martial classified

Under present law, there are three types of courts martial in each, Army, Navy, and Air Force. In the Army and Air Force, they are designated as summary courts martial, special courts martial, and general courts martial. In the Navy, they are designated as deck courts, summary courts martial, and general courts martial. While the general courts martial in each of the services have equivalent authority, the Navy summary court has considerably less jurisdiction than an Army special court, and the same is true of the Navy deck court as contrasted to the Army summary court. This article consolidates provisions as to types of courts martial and number of members. Army and Air Force terminology has been adopted and designated the three types of courts. The maximum limits of the number of members is believed unnecessary. The law officer of a general court martial replaces the law member under the present Articles of War. The law officer is specified in paragraph (1) to show that he is not a member.

Article 17. Jurisdiction of courts martial in general

Subdivision (a) authorizes reciprocal jurisdiction among the armed forces, but makes the exercise of such jurisdiction by any force subject to regulations prescribed by the President. Such regulations will enumerate those situations in which one armed force may try personnel of another armed force. This method of providing for the exercise of reciprocal jurisdiction permits flexibility, in that new situations for which the exercise of such jurisdiction may be desirable, can be provided for as they arise.

The provision in subdivision (b) is particularly applicable to cases where reciprocal jurisdiction has been exercised and is therefore placed in this article. The same practice will be followed in all court-martial cases, however. The disposition of records under article 65 is controlled by this subdivision.

Article 18. Jurisdiction of general courts martial

This article is derived from AW 12. The punishments which may be adjudged are changed from those "authorized by law or the customs of the service" to those "not forbidden by this code" because the law and customs of each of the services differ. Cruel and unusual punishments are forbidden in the code; other punishments which may be adjudged will be made uniform by the regulations prescribed by the President under article 56.

It will be noted in the punitive articles, articles 77-134, that the death penalty can be adjudged only when specifically authorized for the violation of a specific punitive article.

Article 19. Jurisdiction of special courts martial

This article is derived from AW 13. Special courts martial are given the authority to try capital cases under such regulations as the President may prescribe instead of when the officer with general court-martial jurisdiction over the case authorizes. The Navy proposes this procedure so that prior blanket authority may be obtained for capital offenses to be tried by special courts aboard ship where circumstances make it desirable, since it is not practicable to refer such a case to the officer with general court-martial jurisdiction. Death is added to the list of punishments which a special court martial may not adjudge, to cover the cases which a special court tries which would otherwise be capital cases. Other restrictions on punishment are adopted from AW 13. It is intended that special courts martial shall not have jurisdiction to try offenses for which a mandatory punishment has been prescribed by this code.

The provision in AW 13 that a bad-conduct discharge adjudged by a special court martial is subject to approval by an officer with general court martial jurisdiction has been deleted from this article. The review of special courts-martial records and the execution of sentences are covered in articles 65, 66, and 71 of this code.

References: AW 13 and proposed AGN, articles 17 and 20.

Article 20. Jurisdiction of summary courts martial

The right to refuse trial by summary court martial is made absolute, except for the case where a person has been permitted to refuse punishment under article 15.

References: AW 14 and proposed AGN, articles 15 and 16.

Article 21. Jurisdiction of courts martial not exclusive

This article preserves existing Army and Air Force law which gives concurrent jurisdiction to military tribunals other than courts martial. The language of AW 15 has been preserved because it has been construed by the Supreme Court (*Ex Parte Quirin*, 317 U. S. 1 (1942)).

References: AW 15; proposed AGN, article 5 (f).

Article 22. Who may convene general courts martial

This article is derived from AW 8. Provisions for Navy, Air Force, Marine, and Coast Guard convening authorities are added. Paragraphs (6) and (7) permit the President and the Secretaries of the Army, Navy, Air Force, and Treasury (for the Coast Guard when not serving with the Navy) to empower other commanding officers to convene general courts martial. See article 1 for definition of "Department."

Subdivision (b) is derived from AW 8. The word "accuser" is used in place of "accuser or prosecutor," and "accuser" is defined in article 1 in order to clarify its meaning.

References: AW 8; AGN, article 38.

Article 23. Who may convene special courts martial

This article is derived from AW 9. Provisions for all the armed forces have been added. An "officer in charge" is an officer of the naval service or Coast Guard who is not known by the title of "commanding officer" but exercises similar authority. A noncommissioned officer of the Coast Guard who is an officer in charge will not be empowered to appoint a court under this article, since commissioned officers must be appointed to the court. Subdivision (b) conforms to article 22.

References: AW 9; AGN, article 26.

Article 24. Who may convene summary courts martial

This article is derived from AW 10. Provisions for all the armed forces have been added. It is felt appropriate that all persons empowered to convene superior courts martial should also have power to convene inferior courts martial.

References: AW 10; AGN, article 64; proposed AGN, article 15.

Article 25. Who may serve on courts martial

Subdivisions (a), (b), and (c) make officers, warrant officers, and enlisted persons competent to sit as members of courts martial of any armed force, without regard to whether they are members of the same armed force as the convening authority, or of the same armed force as the accused. Placing no limitation on competency in this respect will give the convening authority a maximum number of persons to draw on for membership of a court martial in a situation where he is in command of several small units of different armed forces, or will permit the appointment to a court of persons belonging to the same armed force as the accused in a case in which reciprocal jurisdiction is being exercised. In such cases it is contemplated that the President's regulations on reciprocal jurisdiction will specify what percentage of members will be from the same armed force as the accused. (See art. 17.) As a practical matter, the appointment of mixed courts will not be a common practice.

Subdivision (c) limits the competency of enlisted persons to cases where they are not members of the same unit as the accused. By section 212 of Public Law 759, Eightieth Congress, Congress similarly limited competency to enlisted persons not assigned to the same company or corresponding military unit. A corresponding military unit aboard a ship, which, though it may in some cases be a larger group than the Army company, is the same kind of integrated body, living and working in close association.

The last sentence of the first paragraph of subdivision (c) was added to make it possible to proceed with the trial where competent enlisted persons cannot be obtained. This is to avoid long delay in the administration of justice and the expensive process, which might otherwise be necessary, of transporting enlisted persons great distances to serve as court members. Such delays and expenses would arise in connection with offenses committed on ships at sea or in isolated units ashore, such as remote weather stations. The language of the sub-

division makes it clear that mere inconvenience is no ground for proceeding with the trial without enlisted persons on the court, and the requirement of a detailed written statement including the reasons for such failure insures that the purpose of the subdivision will not be arbitrarily defeated.

References: AW 4, 16; AGN, article 39; proposed AGN, article 24 (a).

Article 26. Law officer of a general court martial

This article is derived from AW 8 with modifications. The law officer is required to be a member of the bar whether or not he is a judge advocate or law specialist. The change in the position of the law officer is reflected in subdivision (b) which requires the accused and counsel to be present when the law officer consults with the court, other than on the form of the findings, and states that the law officer shall not be a voting member of the court. (See art. 51 as to rulings and duties of the law officer, and art. 39 as to when the law officer must be present.)

References: AW 8; proposed AGN, article 24 (b)

Article 27. Appointment of trial counsel and defense counsel

Subdivision (a) of this article incorporates the opening clause and the fourth and fifth provisos of AW 11. The trial judge advocate is renamed the trial counsel, and the right of the accused to have a person requested by him act as defense counsel is subject to the availability of that person. (See art. 38.)

Paragraph (1) of subdivision (b) incorporates the first proviso of AW 11, but the requirement that counsel be qualified as set forth therein is no longer subject to the exception allowed where such qualified persons are not available. Paragraph (2) of this subdivision, the requirement that counsel be certified by the Judge Advocate General, is drawn from article 24 (b) of the proposed AGN.

Subdivision (c) is based on the second proviso of AW 11. It is made applicable only to special courts martial, since the qualification requirements of subdivision (b) with respect to counsel for general courts martial are not subject to exception.

References: AW 11; proposed AGN, articles 18 (b), 24 (b).

Article 28. Appointment of reporters and interpreters

This article is derived from AW 115. The power to appoint reporters and interpreters, however, has been shifted from the president of the court to the convening authority since the latter will have control of the available personnel.

References: AW 115; Naval Courts and Boards, section 361.

Article 29. Absent and additional members

This article is based on proposed AGN, article 27, and limits the reasons for excusing members of general and special courts martial.

Subdivisions (b) and (c) specify the procedure for replacing absent members of general and special courts martial. Where a complete transcript of the testimony is kept, only the record need be read to the new members. However, in special court-martial cases where a complete record may not be kept, only such previous evidence as is stipulated by the parties may be deemed to have been introduced.

New members are subject to challenge for cause, and if the parties have not previously exercised their right for peremptory challenges, they may exercise such right against new members.

Article 30. Charges and specifications

Subdivision (a) is derived from AW 46a and is new for the Navy. The initial procedure in the Navy is now conducted on the basis of a complaint upon which formal charges and specifications are subsequently based. Subdivision (b) requires disposition of the charges as soon as possible and provides for the notification of the accused. Article 98 makes it an offense to unnecessarily delay the disposition of a case.

This article should be read in conjunction with articles 31-35 which deal with procedures before trial.

References: AW 46a; AGN, article 43.

Article 31. Compulsory self-incrimination prohibited

Subdivision (a) extends the privilege against self-incrimination to all persons under all circumstances. Under present Army and Navy provisions only persons who are witnesses are specifically granted the privilege. Subdivision (b) broadens the comparable provision in AW 24 to protect not only persons who are accused of an offense but also those who are suspected of one. Subdivision (c) is similar to AW 24 in that the privilege against self-degradation is granted to witnesses before a military tribunal and persons who make depositions for use before a military tribunal. It is made clear that this privilege cannot be invoked where the evidence is material to the issue—where it might be crucial in the determination of the guilt or innocence of an accused. Subdivision (d) makes statements or evidence obtained in violation of the first three subdivisions inadmissible only against the person from whom they were obtained. This conforms with the theory that the privilege against self-incrimination and self-degradation is a personal one. Although under the rules of evidence a statement obtained from a person by coercion by civil authorities could not be used against that person in a trial by court martial, the committee decided to specifically incorporate this rule by the amendment to this subdivision.

The intentional violation of any of the provisions of this article constitutes an offense punishable under article 98.

It is unnecessary to provide in this article that the failure of an accused to testify does not create a presumption against him. (See title 18, U. S. C., sec. 3481.)

References: AW 24; AGN, article 42 (c).

Article 32. Investigation

This article is derived from AW 46b and is new to the Navy. Subdivision (c) is added to provide for a case where a court of inquiry or other investigation has been held wherein the accused was afforded the rights required by subdivision (b).

Subdivision (d) is added to prevent this article from being construed as jurisdictional in a habeas corpus proceeding. Failure to conduct the investigation required by this article may be grounds for reversal by a reviewing authority under this code. It is the intention of the committee that pretrial investigations be mandatory on military authorities who have the obligation to hold them, but that a failure to conduct such an investigation or less than full compliance, which does not materially prejudice the substantial rights of an accused, shall not constitute jurisdictional error. To hold otherwise would subject all cases involving a plea of guilty to reversal on jurisdictional

error for failure to conduct a pretrial investigation. Certainly, the committee does not intend to endorse any provisions which will bring added delays and unnecessary technicalities into the system of military justice. On the other hand, it should be noted that an officer who **has** the responsibility to order a pretrial investigation who intentionally fails to have such an investigation conducted, and such failure substantially prejudices the rights of an accused, would be guilty of an offense under article 98 of this code.

Article 33. Forwarding of charges

This article is derived from AW 46c and is intended to insure an expeditious processing of charges and specifications in general court-martial trials. The requirement that the report be made in writing will help insure compliance with this article.

Article 34. Advice of staff judge advocate and reference for trial

This article is derived from AW 47b. Subdivision (b) makes clear that in addition to formal corrections, changes in the charges may be made in order to make them conform to the evidence brought out in the investigation without requiring that new charges be drawn and sworn to. The MCM provides that if an essentially different offense is charged as a result of the investigation, the convening authority should direct a new investigation to allow the accused to exercise his privileges with respect to new or different matter alleged.

References: AW 47b; MCM, paragraph 34 (d).

Article 35. Service of charges

This article provides for the serving of charges upon the accused. It also provides that, in time of peace, no person shall be brought to trial before a general court martial, against his objection, before 5 days after the service of charges upon him, or before 3 days after service of charges upon him in a special court-martial case.

References: AW 46 (c); AGN, article 43; proposed AGN, article 37.

Article 36. President may prescribe rules

This article is derived from AW 38. Proposed AGN, article 48 is similar except that the Secretary of the Navy would be authorized to prescribe rules instead of the President. This article standardizes this authority in the President and provides that all rules and regulations prescribed by the President shall be uniform insofar as practical.

References: AW 38; AGN, articles 34, 64 (e); proposed AGN, article 48.

Article 37. Unlawfully influencing action of court

This article incorporates the provisions of AW 88. In addition it prohibits the convening authority from influencing the law officer or counsel. This is similar to the proposed AGN except that the Secretary of the Navy would control such coercion by regulation.

This article is not intended to preclude a reviewing authority from making fair comment on errors of the court in an opinion which is made in the course of review, or from returning a record for revision of errors, or from taking appropriate action when a member of a court has so misbehaved as to abandon his judicial responsibilities or duties.

Article 98 of this code would make violations of this article an offense.

References: AW 88; proposed AGN, articles 9 (45), 39 (j).

Article 38. Duties of trial counsel and defense counsel

Subdivisions (a) and (b) are derived from AW 17 and AW 11.

Subdivision (c): A similar provision appearing in the proposed AGN, article 78, made it mandatory for defense counsel either to submit a brief of such matters as he felt should be considered on review or a statement setting forth his reasons for not so doing. This provision was not adopted because it was felt that if the latter alternative were chosen it might actually prejudice the accused on review. The permissive provision is inserted in the code to encourage defense counsel to submit briefs in appropriate cases.

Subdivisions (d) and (e) are derived from AW 116. Stricter requirements governing the circumstances under which assistant counsel may act independently of the trial counsel or defense counsel are imposed in order to maintain the quality of counsel and to protect the accused.

References: AW 11, 17, 116; proposed AGN, articles 18 (b), 18 (c), 24 (b), 38.

Article 39. Sessions

This article expands the provisions of AW 30 to require the presence of all parties and the law officer except when the members of the court retire to vote or deliberate, or when the law officer is to record the findings. In the latter case, the reporter is to accompany the law officer and a verbatim transcript of the proceedings is to be kept. The article also prohibits the court from consulting with either the trial counsel, counsel for the accused, or the law officer in the absence of the others. The requirement of AW 8 that no evidence be received in the absence of the law officer is extended in that the law officer must be present at all times except when the members are to vote or deliberate. The law officer is not a "member" of the court and is not to be present during deliberations or voting. (See art. 26.) This will not mean, however, that the court will be without the benefit of the legal advice of the law officer during its deliberations, for he is to charge them under article 51 and under article 39 they may seek further instructions; but the instructions will be in the presence of the accused and made part of the record.

References: AW 8, 30; NC and B, sections 373, 402.

Article 40. Continuances

This article follows the present Army and Navy provisions relative to the granting of continuances for reasonable cause in court-martial cases.

References: AW 20; proposed AGN, article 37.

Article 41. Challenges

Subdivision (a) provides for challenges for cause of members of a general or special court martial and the law officer of a general court martial.

Subdivision (b) authorizes one peremptory challenge by the trial counsel and one peremptory challenge for each accused. Under existing law, the Navy permits no peremptory challenges and the Army permits only one peremptory challenge for each side, regardless of the number of codefendants.

References: AW 18; proposed AGN, articles 19, 24 (b), and 25.

Article 42. Oaths

This article requires that officials and clerical assistants of general and special courts martial be sworn. The oaths are not specified in the code as it is felt that the language of the oaths is suitable matter for regulations.

The article does not require the court to be resworn in every case. The language would allow a court to be sworn once a day where there is to be more than one trial, if the accused in each trial is present at the time that the court is initially sworn.

References: AW 19; AGN articles 28, 40, 41; proposed AGN, articles 19, 25.

Article 43. Statute of limitations

Generally speaking, this article provides a statute of limitations of 3 years (b) in the more serious offenses, and a statute of limitations of 2 years in less serious offenses, no statute of limitations for the offense of desertion or absence without leave in time of war, aiding the enemy, mutiny, or murder, and prescribes the conditions under which the statute of limitations will not run.

Subdivision (a): Adopted from AW 39 and proposed AGN, article 5 (b). "Aiding the enemy" is added to the list of offenses which may be tried and punished at any time.

Subdivision (b): Adopted from AW 39. The time when the period of limitation will stop running is changed from the time of arraignment to the time sworn charges and specifications are received by an officer exercising summary court-martial jurisdiction over the command. This provision is considered preferable to the more indefinite provision in AW 39 that the statute is tolled when "by reason of some manifest impediment the accused shall not have been amenable to military justice."

Subdivision (c): This covers all other offenses. The period of limitation is made applicable to trials by court martial and to punishment by a commanding officer.

Subdivision (d): The language used in the second proviso of AW 39 is changed because of its indefiniteness. The clauses "in the custody of civil authorities" and "in the hands of the enemy" are adopted from Navy proposals.

Subdivision (e): Adopted from AW 39.

Subdivision (f): Incorporates the provision in title 18, U. S. C., section 3287, which otherwise might not be applicable to court-martial cases.

References: AW 39; proposed AGN, article 5 (b); title 18, U. S. C., section 3287 (1948), (wartime suspension of limitations).

Article 44. Former jeopardy

This article should be considered with articles 62 and 63. All three have their source in present AW 40 and AW 52 and incorporate the traditional military rules of jeopardy. The military rules have been adopted to accommodate the system of automatic appellate review which now exists in all services and which is incorporated in this Code, a system whereby every accused's case is reviewed for error whether or not he requests such review. This right to automatic review raises several questions in connection with jeopardy, the most important of which has to do with the right of a reviewing authority to order a rehearing.

In the civil courts the defendant gets a new trial on his own petition, and the new trial is not improper since this request can be said to amount to a waiver of jeopardy. This waiver has been held to be such that upon the new trial he could be convicted of a higher degree of the offense of which he was originally convicted and could be awarded a severer sentence than the original sentence. No such request is made under the military system and a rehearing is automatically awarded where justified. Thus the waiver doctrine is hardly applicable. On the other hand, under the military system the accused is given additional protection in that on the rehearing he may not be convicted of any higher degree of the offense of which originally convicted, nor may he be given a more severe sentence.

The jeopardy provisions of the bill enable the continuation of the highly desirable features and safeguards of the automatic review system. Two changes, however, have been made in existing law. The first, which was incorporated in the original bill, forbids a rehearing where the prosecution failed to make even a *prima facie* case. (See article 63.) The second, prevents the retrial of a case which is terminated by the prosecution for failure of available evidence or witnesses. Both changes represent a substantial strengthening of the rights of an accused.

Article 45. Pleas of the accused

Subdivision (a): Drawn from present Army and Navy provisions, except for the provision for entering the plea of not guilty in the record, which is new. The question whether the plea of not guilty should be entered, in the situations covered in this subdivision, will be treated as an interlocutory question, according to the procedure prescribed in article 51 of this code.

It is not intended that a plea of not guilty to the offense charges, but guilty to a lesser included offense, will be an irregular pleading within the meaning of this article.

Subdivision (b) is new but enunciates a rule now followed by the Army, and, as to certain capital offenses, by the Navy.

The provisions of this article will be supplemented by regulations issued by the President. It is contemplated that the recommendations of the Keeffe Board as to the procedure to be followed by a court martial when a plea of guilty is entered will be adopted. The proposed procedure is as follows (see Keeffe report, p. 142):

(1) In general and special court-martial cases, the plea should be received only after the accused has had an opportunity to consult with counsel appointed for or selected by him. If the accused has refused counsel, the plea should not be received.

(2) In every case the meaning and effect of a plea of guilty should be explained to the accused (by the law officer of a general court martial; by the president of a special court martial; by the summary court), such explanation to include the following:

(a) That the plea admits the offense as charged (or in a lesser degree, if so pleaded) and makes conviction mandatory.

(b) The sentence which may be imposed.

(c) That unless the accused admits doing the acts charged, a plea of guilty will not be accepted.

(3) The question whether the plea will be received will be treated as an interlocutory question.

(4) The explanation made and the accused's reply thereto should be set forth in the record of trial exactly as given.

It is also contemplated that the regulations will provide that the law officer or the court shall explain the meaning of any special defenses or objections which may appear to be available to the accused, in any case in which he is not represented by counsel, and shall advise him of his right to make them, both as to the offense charged and lesser included offenses, before pleading to the general issue.

The provisions contained in chapter XIII of the Manual for Courts Martial, United States Army, 1949, dealing with the procedure for raising special defenses and objections by motion, were considered by the ad hoc committee in connection with this article and approved as a sound basis for similar provisions to appear in the new regulations. The ad hoc committee also considered, and approved, the provisions in the 1949 Manual for Courts Martial requiring that if it appears from the charges that the statute of limitations has run against an offense, or in the case of a continuing offense, a part of an offense charged, the court will bring the matter to the attention of the accused and advise him of his right to assert the statute. If the accused pleads guilty to a lesser included offense against which the statute of limitations has apparently run, the court will advise the accused of his right to interpose the statute in bar of trial and punishment as to that offense. Similarly, at the time the court is making its findings, if by exceptions and substitutions the accused is found guilty of a lesser included offense, to which he has not entered any plea, the court will advise him in open court of his right to avail himself of the statute in bar of punishment.

References: AW 21; NC and B, sections 413, 416, 417.

Article 46. Opportunity to obtain witnesses and other evidence

This article provides equal opportunity to the prosecution and defense to obtain witnesses and other evidence. It is based on AW 22 and proposed AGN, article 35.

It is considered appropriate to leave the mechanical details as to the issuance of process to regulation.

References: AW 22; AGN, article 42 (b); proposed AGN, article 35.

Article 47. Refusal to appear or testify

This article provides the authority and the penalty for the violation of such authority to compel persons, not subject to this code, to testify in court-martial cases when duly subpoenaed.

Violation of this article is punishable in a United States district court or in a court of original criminal jurisdiction in any of the Territorial possessions of the United States.

This article is derived from AW 23. Proposed AGN, article 35 (c) is similar. The proviso in AW 23 making certain offenses in title 18, U. S. C., applicable to proceedings before courts martial is omitted, since the language of title 18 includes the important offenses against military justice, such as perjury and bribery of judicial officers. (See title 18, U. S. C., secs. 206, 210, 1621, 1622 (1948).)

References: AW 23; AGN, article 42 (c); proposed AGN, article 35 (b).

Article 48. Contempts

This article gives courts-martial and other military tribunals authority to summarily punish for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder. Maximum punishment is confinement for 30 days or a fine of \$100, or both. It is felt essential to the proper functioning of a court that such court have direct control over the conduct of persons appearing before it.

References: AW 32; AGN, article 42 (a); proposed AGN, article 25.

Article 49. Depositions

This article provides the authority for the taking and use of depositions in court-martial trials. It should be noted that a deposition may be read in evidence in any case in which the death penalty is authorized by law but is not mandatory, whenever the convening authority shall have directed that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court martial (f).

Subdivision (a) is derived from the third proviso of AW 25. The first sentence is new in that it permits any party to take a deposition after charges are signed unless an officer with authority to convene a court martial for the trial of such charges forbids it for good cause. When such an authority is to designate officers to take depositions, he should consult the accused prior to designating an officer to represent the accused, or if the accused has counsel representing him in other pretrial matters, such counsel should be designated to represent the accused if available.

Subdivision (b) conforms to present practice in all services.

Subdivision (c) is derived from AW 26 and conforms to present Navy practice.

Subdivision (d) is derived from AW 25 and proposed AGN, article 26. The admissibility of a deposition is made dependent upon the need for its use at the time of trial. The same rules of evidence apply to testimony in depositions as apply to oral testimony.

Subdivisions (e) and (f) are derived from AW 25. The proposed AGN does not contain similar provisions.

References: AW 25, 26; proposed AGN, article 36.

Article 50. Admissibility of records of courts of inquiry

This article specifies the conditions under which the records of a court of inquiry may be used in a subsequent court-martial case.

This article is derived from AW 27 and is similar to present Navy practice.

The effect of the use of the words "not capital and not extending to the dismissal of an officer" is that if the prosecution uses the record of a court of inquiry to prove part of the allegations in one specification, neither death nor dismissal may be adjudged as a result of a conviction under that specification. The introduction of the record of a court of inquiry by the defense shall not affect the punishment which may be adjudged.

References: AW 27; AGN, article 60; proposed AGN, article 44.

Article 51. Voting and rulings

This article prescribes the manner in which members of the court martial shall vote. It also provides the authority for the law officer

of a general court and the president of a special court to make final rulings upon all interlocutory questions, other than challenge and other than a motion for a finding of not guilty, or the question of accused's sanity.

Subdivision (c) prescribes that the law officer of a general court martial and the president of a special court martial shall instruct the court as to the elements of the offense and charge the court on presumption of innocence, reasonable doubt as to guilt, reasonable doubt as to degree of guilt, and burden of proof. This subdivision sets out the minimum requirements as to the scope of the instructions. It will not prevent him from charging on additional rules of law which are germane to the case.

This article is derived from AW 31. The provision of AW 31 allowing the law officer to consult with the court before making a ruling is deleted. In subdivision (c) the law officer and the president of a special court martial are required to instruct the court as to the elements of the offense in addition to those matters specified in AW 31.

The proposed AGN does not require a secret written ballot, but does require the law officer to instruct the court as to the elements of the offense.

References: AW 31; proposed AGN, article 24.

Article 52. Number of votes required

This article is derived from AW 43. Proposed AGN, article 28, would require only a majority vote to convict of any offense, but is the same as AW 43 as to the number of votes required for sentences.

Paragraph (3) of subdivision (b) clarifies AW 43 as to the number of votes required for a sentence which does not extend to death or imprisonment in excess of 10 years.

Subdivision (c) clarifies the method for determination of issues to be decided by a majority vote when the vote is tied. It is felt that a tie vote on a challenge should disqualify the person challenged regardless of whether the challenge is by the prosecution or by the defense. It is also felt that a motion for a finding of not guilty and the question of the accused's sanity should not be decided by a tie vote as these are considered again in the vote on the findings. All other tie votes are determined in favor of the accused.

References: AW 43; AGN, article 50; proposed AGN, article 28.

Article 53. Court to announce action

This article is derived from proposed AGN, article 28, and requires the trial counsel, the accused, and the defense counsel to be informed of the findings and sentence as soon as the sentence is determined. The findings may be announced as soon as they are determined if it is believed appropriate to do so. AW 29 requires an acquittal to be announced, but leaves the announcement of the sentence and findings of guilty to the discretion of the court. It is felt appropriate, however, that the accused and his counsel be informed as to the outcome of the trial as soon as the results are determined.

References: AW 29; proposed AGN, article 28.

Article 54. Record of trial

Subdivision (a) contains provisions similar to those of proposed AGN, article 29, but differs from AW 33 in that the law officer and the president authenticate the record of a general court martial. AW 33

requires the trial counsel and the president to authenticate the record. It is intended that records of general courts martial shall contain a verbatim transcript of the proceedings.

Subdivision (b) is derived from AW 34. This article is subject to the provision of article 19 which requires a complete record to be kept in cases where a bad-conduct discharge is adjudged.

Subdivision (c) is new. Under AW 111 a copy of a general court-martial record is given to the accused if he demands it. Under Navy practice, the accused is automatically given a copy of the record of a general court martial. This article goes further in that a copy of the record of a general or special court martial is required to be given to the accused. It is felt to be appropriate that the accused should have a copy of such records for his personal use. If such records contain classified matter, means of safekeeping should be provided.

References: AW 33, 34, 111; AGN, articles 34, 64; proposed AGN, articles 16 (e), 21, 29.

Article 55. Cruel and unusual punishments prohibited

This article prevents punishment by flogging, branding, marking, or tattooing on the body, and prohibits the use of irons, single or double, except for the purpose of safe custody. Generally speaking, it reenacts existing provisions of law.

References: AW 41; proposed AGN, article 31.

Article 56. Maximum limits

This article authorizes the President to establish maximum limits of punishment for any offense, except one for which a mandatory punishment is prescribed.

References: AW 45; proposed AGN article 33 (b).

Article 57. Effective date of sentences

This article is new. Subdivision (a) prohibits the forfeiture of pay or allowances becoming due before the date of approval by the convening authority. Formerly an Army court-martial sentence could forfeit such earnings. In addition, subdivision (a) permits the forfeiture of pay and allowances becoming due after the date of approval by the convening authority but before the date of final approval by the Secretary, where such final approval is necessary. It is felt appropriate that where an accused is sentenced to both forfeiture and confinement, the forfeiture should reach all pay becoming due while the accused is in confinement awaiting final approval of the sentence. Under article 71 such pay cannot be taken until the sentence is ordered executed after any such required final approval.

Subdivision (b) requires a sentence of confinement to begin to run on the date that it is adjudged even though the accused is not actually in confinement, unless the sentence is suspended.

Article 58. Execution of confinement

This article authorizes any sentence of confinement adjudged by a court martial or other military tribunal to be carried into execution by confinement in any place of confinement under the control of any of the armed forces. In addition, it authorizes confinement in any penal or correctional institution under the control of the United States or which the United States may be allowed to use.

Subdivision (a) is derived from AGN, article 7, which permits the Navy to transfer court-martial prisoners to institutions under the con-

trol of the Department of Justice. The Navy has found this practice to be beneficial both to the service and to the prisoner. Both the Army and Navy officers in charge of correctional policies recommend the adoption of subdivision (a). It is the policy of the armed forces to segregate youthful and rehabilitable prisoners from the hardened criminals and incorrigibles and to provide for the maximum rehabilitation of prisoners for the purpose of restoration to duty or successful adjustment in civil life. However, due to lack of facilities and personnel with long and continuous experience in the highly technical and specialized phases of penology, the armed forces have serious handicaps in dealing with prisoners with long civilian criminal records, criminal psychopaths, sex deviates, violent incorrigibles, and other prisoners requiring special treatment. The Army in operating under AW 42 has met with great difficulty in segregating the varied types of prisoners and in giving them specialized treatment. It is felt that the rehabilitation of prisoners who create special problems could be expedited by transferring them to the highly specialized institutions under control of the Department of Justice, which range from training schools and reformatories to major penitentiaries and provide for the treatment of prisoners according to their needs.

From past experience, the services have found that the type of treatment suited for individuals does not depend on the type of offense or on the length of the sentence. Many of the prisoners who cause special problems in disciplinary barracks are those convicted of military offenses, such as a. w. o. l. or desertion.

Subdivision (b) incorporates the second proviso of AW 37 and conforms to present Navy practice.

References: AW 37, 42; AGN, article 7.

Article 59. Error of law; lesser included offense

This article permits a reviewing authority to sustain a finding of guilty even though error has been committed when it can be determined that the error does not materially prejudice the substantial rights of the accused. It likewise authorizes any reviewing authority to approve or affirm so much of the finding as includes a lesser included offense.

Subdivision (a) is adapted from AW 37. In light of certain new procedural requirements in this code, such as the requirement that the law officer of a general court martial instruct the court as to the elements of the offense, this subdivision is an extremely important one and should be given full force and effect. On the matter of technical errors NC and B, section 472 contains the following statement:

If there has been no miscarriage of justice, the finding of the court should not be set aside or a new trial granted because of technical errors or defects which do not affect the substantial rights of the accused.

Subdivision (b) is taken from AW 47 (f), 49 (a) and article 39 (d), (e) of the proposed AGN. MCM, paragraph 78 (c), defines a lesser included offense as follows:

The test as to whether an offense found is necessarily included in that charged is that it is included only if it is necessary in proving the offense charged to prove all the elements of the offense found.

References: AW 37, 47 (f), 49 (a); proposed AGN, article 39 (d), (e); NC and B, section 472.

Article 60. Initial action on the record

This article prescribes who may take initial action on court-martial records. It is taken principally from AW 47 (c). There is no similar provision in the AGN, but NC and B, section 479, provides that the reviewing power vests in the office, not the person, of the authority so acting.

References: AW 35, 47 (c); NC and B, section 479.

Article 61. Same—General court-martial records

The convening authority is herein required to refer the record of every general court martial to his staff judge advocate or legal officer, who shall submit his written opinion thereon to the convening authority. The convening authority may ignore the written opinion of the staff judge advocate; however, such opinion shall go forward with the record and shall be given such weight as subsequent reviewing authorities may deem appropriate.

The article is drawn principally from AW 47 (c). The requirement that the convening authority refer the record to his staff judge advocate or legal officer is new for the Navy. The requirement that the staff judge advocate or legal officer write an opinion on the jurisdiction of the court in cases of acquittal conforms to present Army practice. (See art. 65 with reference to opinions and records in cases where there is a finding of guilty.)

References: AW 35, 47 (c).

Article 62. Reconsideration and revision

This article permits the convening authority to return a court-martial record to the court for reconsideration of a dismissal which does not amount to a finding of not guilty. He may also return it for the correction of any apparent error or omission, or any improper or inconsistent action by the court, provided this can be corrected without material prejudice to the substantial rights of the accused. This is in conformity with present practice in the services.

Subdivision (b) incorporates provisions of AW 40 and prohibits returning the record for reconsideration of a finding of not guilty or a ruling which amounts to a finding of not guilty, or for increasing the severity of the sentence unless the sentence prescribed for the offense is mandatory. This last situation is possible where a court has given less than the death penalty for the offense of spying in wartime, which carries a mandatory sentence of death. The committee amendment reincorporates language from AW 40 to make it clear that the convening authority may return the record where the court has found the accused guilty of a specification and not guilty of a charge and the specification sufficiently alleges a violation of some article.

References: AW 40; proposed AGN, article 39 (i); MCM, paragraphs 64 (f), 83, 87 (b); NC and B, sections 410, 458-468.

Article 63. Rehearings

This article gives the convening authority the authority to order a rehearing in cases in which he disapproves the findings and sentence, except those cases where there is a lack of sufficient evidence in the record to support the findings.

This article is adopted from AW 52. The Navy has no similar statutory provision. The Army term "rehearing" has been adopted to distinguish a proceeding under this article from the new trial specified in article 73.

Subdivision (a) provides, in conformance with the usual concept of double jeopardy, that the convening authority shall not order a rehearing where the prosecution has failed to establish a *prima facie* case—has failed, as a matter of law, to introduce sufficient evidence to warrant the finding. The phrase “evidence in the record” is intended to authorize rehearings where the prosecution has made its case on evidence which was improperly admitted at the trial, evidence for which there may well have been an admissible substitute.

Subdivision (b) contains the limitations on the sentence which can be adjudged by a court on rehearing, with an exception for mandatory sentences. Without this exception the court on rehearing could impose no sentence at all where the original sentence was less than that made mandatory for the offenses. For a mandatory sentence see article 106.

A rehearing is a continuation of the former proceeding, and if the original court had no jurisdiction in the case, none of the restrictions of this article apply to a subsequent trial on the same charges.

References: AW 52; NC and B, section 477.

Article 64. Approval by the convening authority

This article authorizes the convening authority to approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and determines should be approved.

It substantially conforms to present practice in all the armed forces. The convening authority can approve a finding only if he finds that it conforms to the weight of the evidence and that there has been no error of law which materially prejudices the substantial rights of the accused. (See art. 59, commentary.) He may approve only so much of a finding as involves a finding of guilty of a lesser included offense. (See art. 59.) He may disapprove a finding or a sentence for any reason.

References: AW 47 (c), (f); AGN, articles 33, 54, 64 (d); proposed AGN, article 39 (b).

Article 65. Disposition of records after review by the convening authority

This article prescribes the procedure which shall be followed by convening authorities in the disposition of court-martial records after they have taken final action on such records.

Subdivision (a) incorporates present Army practice. Navy practice is similar except that no opinion by the legal officer is required.

Subdivision (b) is derived from AW 36 except that the record may be sent directly to the Judge Advocate General. This alternative is permitted in order to provide for situations where no judge advocate or law specialist is assigned to the staff of the officer exercising general court-martial jurisdiction or where direct transmittal to the Judge Advocate General or a branch office would be more expeditious. Proposed AGN, article 39 (d) is similar to AW 36.

Subdivision (c) permits the review of other special and summary courts martial to be prescribed by regulations, subject to the requirement that all such records shall be reviewed by a law specialist or judge advocate (or lawyer in a Coast Guard case). The reason for this provision is that the volume of cases, the availability of law specialists and judge advocates, and the feasibility of reviewing records in the field may differ in the various armed forces.

The disposal of special and summary court-martial records is also left to regulation, because of the varying needs of the armed forces. It is intended, however, that such records shall be retained until no longer of use either to the armed force concerned or to the accused.

References: AW 35, 36; proposed AGN, articles 21, 39 (d), 39 (e).

Article 66. Review by the Board of Review

This article adopts the Army system of review by a formally constituted Board. Required qualifications of the members are new, however, and a provision permitting civilian members has been added for the Coast Guard. (See subdivision (a).)

Review of all the cases specified in subdivision (b) is automatic, whether or not the sentence is suspended. The types of cases receiving automatic review by the Board are substantially the same as those under the present Articles of War except that for sentences involving penitentiary confinement there have been substituted sentences involving confinement for more than 1 year. This conforms to changes in the system of confinement in article 58. For review of other cases by a Board of Review see article 69.

The Board of Review shall affirm a finding of guilty of an offense or a lesser included offense (see art. 59) if it determines that the finding conforms to the weight of the evidence and that there has been no error of law which materially prejudices the substantial rights of the accused. (See art. 59, commentary.) The Board may set aside, on the basis of the record, any part of a sentence, either because it is illegal or because it is inappropriate. It is contemplated that this power will be exercised to establish uniformity of sentences throughout the armed forces. (See art. 67 (g).)

Subdivision (d) deals with the power to order a rehearing. (See art. 63.)

References: AW 50 (a), (d), (e), (g); 51, 52; proposed AGN, article 39 (e), (f).

Article 67. Review by the Court of Military Appeals

This article is new although the concept of a final appellate tribunal is not. Proposed AGN, article 39 (g) provides for a board of appeals while AW 50 (a) provides for a judicial council. Both of these tribunals, however, are within the Department. The Court of Military Appeals provided for in this article is established in the National Military Establishment for the purpose of administration only, and will not be subject to the authority, direction, or control of the Secretary of Defense. The terms of the judges are fixed at 8 years. The judges are to be highly qualified civilians and for this reason the compensation has been made the same as that of a judge of the United States Court of Appeals.

Paragraph (2) of subdivision (a) provides for the staggering of the terms of the judges.

Paragraph (3) provides for removal of a judge for cause. Grounds for removal are generally similar to those available against a judge of the Tax Court, except that mental or physical disability is made a ground for removal. (See 26 U. S. C. 1102.)

Paragraph (4) follows the retirement provisions applicable to judges of courts in Territories and possessions. (See 28 U. S. C. 373.)

Paragraph (5) provides authority for the President to assign a United States Court of Appeals judge on a temporary basis to fill any

vacancy caused by the illness or disability of a judge of the Court of Military Appeals. The provision is adopted so that statutory authority will exist to keep the Court of Military Appeals at full strength during periods when the case load is very heavy. Such authority is desirable because of the provision in subdivision (c) requiring that the Court of Military Appeals act upon a petition for review within 30 days of its receipt.

Automatic review before the Court of Military Appeals is provided for all cases which must be approved by the President. (See AW 71.) The Judge Advocate General may direct that a case be reviewed by the court, and an accused may request review and will receive it where the court finds good cause.

The time limits specified in subdivision (c) are necessary to eliminate undue delay in the execution of sentences.

The Court of Military Appeals takes action only with respect to matters of law. In this it differs from the final appellate tribunals now set up in or proposed for the Departments. It may act only with respect to the findings and sentence as approved by the convening authority. If the Board of Review has set aside a finding as against the weight of the evidence this decision cannot be reconsidered by the court. If, on the other hand, the Board has set a case aside because of the improper introduction of evidence or because of other prejudicial error, the Court of Military Appeals may reverse if it finds there has been no such error.

The court shall affirm the findings and the sentence if it determines that, with respect to the matters which it considers, there has been no error of law which materially prejudices the substantial rights of the accused. (See art. 59, commentary.) It may affirm so much of a finding of guilty as involves a finding of guilty of a lesser included offense. (See art. 59.) The only action which the court may take with respect to the sentence is to determine whether or not it is within legal limits.

As to the power to order a rehearing covered in subdivision (e), see article 63.

Subdivision (g) assures an annual review of the operation of the code and will be instrumental toward the uniform administration thereof.

References: AW 48, 49, 50 (a), (c), (g); 51, 52; proposed AGN, article 39 (g).

Article 68. Branch offices

This article provides the authority for the President to direct the Judge Advocate General to establish a branch office under an Assistant Judge Advocate General with any distant command, and to establish in such branch office one or more boards of review.

Subdivision (a) incorporates AW 50 (c) with modifications to conform to the review under this code. The AGN contains no similar provision, but the Navy feels that it would be useful in times of emergency.

References: AW 50 (c).

Article 69. Review in the Office of the Judge Advocate General

This article provides for the appellate review in the Office of the Judge Advocate General of every record of trial by general court martial in which there has been a finding of guilty and a sentence, the appellate review of which is not otherwise provided for by article 66.

This article conforms to AW 50 (f). The cases involve minor sentences so that, generally speaking, review by the Court of Military Appeals is unnecessary and would only overload the court. However, since even minor cases may involve major differences of interpretation between the services, the authority is provided to allow the Judge Advocate General to send such cases up for review.

References: AW 50 (f); proposed AGN, article 39 (e).

Article 70. Appellate counsel

Appellate review having been provided for in other provisions of the code, this article provides appellate counsel for both the Government and the defense.

This article is new and is included in the code in order that the accused may be represented on review. Such representation will assure that the accused's case will be thoroughly considered. Appellate counsel must have the qualifications of counsel before a general court martial.

Article 71. Execution of sentence; suspension of sentence

Subdivision (a) is derived from AW 48 (a). Proposed AGN, article 39 (a) is similar except that sentences involving a flag officer are treated in the same manner as sentences involving other officers. The words "as he sees fit" are intended to give the President absolute discretion in determining the amount of the sentence to be approved by him.

Subdivision (b) is derived from AW 48 (c) and AW 44. Proposed AGN, article 39 (a) requires a dismissal to be confirmed by the President, or by the Secretary when empowered by the President. It is felt appropriate, however, to place this power initially in the Secretary of the Department and to allow delegation of this power in order to provide for periods of expansion of the armed forces. It was felt more appropriate to place the power to change a dismissal to reduction to ranks in the Secretary rather than in a court martial as provided in AW 44.

Subdivision (c) is derived from AW 48 (c) and AW 50 (e). Sentences required to be affirmed by a Board of Review may not be ordered executed until such review and any further review by the Court of Military Appeals under article 67 is completed. Thus, such sentences may be ordered executed 30 days after the accused has been notified of the decision of the Board of Review if he has not petitioned the court for review within that period.

Subdivision (d) is derived from AW 47 (d). The proposed AGN would require execution of sentences not extending to punishments specified in subdivisions (a), (b), and (c) to be executed upon announcement by the court. It is felt appropriate, however, to require review by the convening authority before ordering execution of any sentence. The convening authority is given power to suspend sentences other than death sentences. (See art. 74 as to the power of other officers to suspend sentences.)

References: AW 44, 47 (d), 48 (a), 48 (c), 49, 50 (e); proposed AGN, Article 39 (a), 39 (c).

Article 72. Vacation of suspension

This article is new. It applies where a sentence has been suspended pending good behavior of the accused; that is, where the accused is a probationer. Under present Navy practice, the commanding officer of a probationer has authority to vacate probation whenever he deems

the conduct of the probationer unsatisfactory. Under Army practice, an officer who has the power to convene a court of the kind which adjudged the sentence may similarly vacate probation.

This article requires that where the vacating of the suspension of a serious sentence is contemplated, a record of the facts justifying the vacating action will be made and these facts will be given consideration by two officers.

Where the original sentence includes a bad-conduct or dishonorable discharge, or confinement in excess of 1 year, such vacation will not be effective to execute the sentence until the review provided in articles 66 and 67 has been completed. Where the suspended sentence includes a dismissal, the Secretary of the Department must act before the dismissal may be executed, whether or not he has previously approved it.

References: AW 51 (b); MCM, paragraph 94; NC and B, section 476; Keffe report, pages 313-318.

Article 73. Petition for a new trial

This article provides for a petition for a new trial as provided in AW 53 and in proposed AGN, article 39 (g). Action on the petition is to be taken by a board of review or the Court of Military Appeals if the case is being reviewed or is to be reviewed by such tribunal. Otherwise the Judge Advocate General shall either deny or grant the new trial. (See art. 75 as to restoration of rights, privileges, and property after a new trial.)

References: AW 53; proposed AGN, article 39 (g).

Article 74. Remission and suspension

Under this article the Secretary of a department may review the sentence of any court martial, which will give him clemency and parole powers as well as ultimate control of sentence uniformity. Action hereunder may be taken without regard to whether the person acting has previously approved the sentence.

References: AW 51 (b); proposed AGN, article 39 (h).

Article 75. Restoration

This article is new in that restoration of rights, privileges, and property is mandatory and in that restitution of forfeitures previously collected is authorized. If a new trial or rehearing is ordered, restoration is to be made in regard to such part of the original sentence as is not adjudged upon the new trial or rehearing.

Under subdivision (b), the Secretary of the Department shall order an administrative discharge substituted for a bad-conduct or dishonorable discharge which has not been sustained on a new trial unless the accused is to be restored to duty.

Subdivision (c) requires an administrative discharge to be substituted for a dismissal which is not sustained on a new trial. In addition, the President is given authority to reappoint the accused to such rank and precedence as he believes will correct the injustice of the dismissal.

This article applies not only to new trials but also to all cases where an executed or partly executed sentence is set aside or disapproved under the provisions of this code.

References: AW 53.

Article 76. Finality of court-martial judgments

This article is derived from AW 50 (h) and is modified to conform to terminology used in this code. Subject only to a petition for a writ of habeas corpus in Federal court, it provides for the finality of court-martial proceedings and judgments.

References: AW 50 (h).

Articles 77-134. Punitive articles

The punitive articles in the proposed code are contained in articles 77-134. In the preparation of the proposed code, it was noted that there were some differences in the punitive articles as defined in the Articles of War as contrasted to the same or similar offenses as defined in the Articles for the Government of the Navy. Generally speaking, the Articles of War define the so-called military offenses. The Articles for the Government of the Navy likewise define most of the military offenses, but in neither case are all of the offenses defined. It is also true that some crimes are peculiar to one service and are not provided for in the other. Most of the civil types of crimes are not defined in existing military law and there are some differences in the crimes which are defined. The civil types of crimes in the Articles of War, as defined by the Manual, are generally based on the common-law definition of the State of Maryland which, as a matter of fact, is very close to Federal definitions of the same offenses. Comparable crimes are enumerated in the Articles for the Government of the Navy but are not therein defined. However, Naval Courts and Boards, which defines the crimes, generally follows the Federal statutory definitions. All of these differences have been reconciled in writing the punitive articles of this code.

Neither the Articles of War nor the Articles for the Government of the Navy provide a statutory definition for principals, accessories, conviction of lesser included offense, attempts, conspiracy, and solicitation. Each of these is statutorily defined in articles 77-82, respectively.

Article of War 96 and AGN, article 22 (a), are both general articles. These provisions have been retained in article 134 of this code. This will permit the punishment of "disorders and neglects to the prejudice of good order and discipline in the armed forces, and all conduct of a nature to bring discredit upon the armed forces." It will also authorize trial by court martial for violation of State and Federal crimes which are not enumerated as offenses under this code.

Article 135. Courts of inquiry

This article is a combination of Army and Navy provisions as to courts of inquiry. Army courts of inquiry, at present, may only be convened at the request of the person whose conduct is to be investigated. Naval courts of inquiry, however, may be convened for any formal investigation. Subdivision (a) grants this broader power.

Subdivision (b) does not change the number of members of courts of inquiry in either service, but does provide for a counsel whose duties are to assist the court in matters of law, presentation of evidence, and in the keeping of the record.

Subdivision (c) adopts the substance of proposed AGN, article 42. The provision in regard to employees of the National Military Establishment is included in order to allow employees whose conduct may

be involved in the inquiry to intervene in order to protect their rights or reputations.

Subdivisions (d) and (e) conform to present Army and Navy practice.

Subdivision (f) is derived from AW 101. Under Navy practice witnesses may be but are not required to be sworn.

Subdivisions (g) and (h) conform to Army and Navy practice.

References: AW 97-103; proposed AGN, articles 42, 43, 44.

Article 136. Authority to administer oaths and to act as notary

This article is a combination and modification of AW 114 and AGN, article 69. Only certain persons specified are given notarial powers, as it is believed inappropriate that persons having temporary powers to administer oaths should notarize legal instruments which may have drastic legal consequences if incorrectly drawn. The persons specified in subdivision (a) are believed to have legal experience or experience in personnel matters. Commanding officers of the Navy and Coast Guard are included in subdivision (a) as Navy and Coast Guard commands do not have adjutants and personnel adjutants.

References: AW 114; AGN, article 69; proposed AGN, article 47 (a).

Article 137. Articles to be explained

This article is derived from AW 110, but requires the articles to be carefully explained instead of being read, as it is felt that a careful explanation is of more value than a mere reading. The language would also permit training films to be used to explain the code. The requirement that the code be read every 6 months is omitted as it is felt that a thorough indoctrination is more beneficial than a required reading every 6 months.

References: AW 110; AGN, article 20 (tenth).

Article 138. Complaints of wrongs

This article provides a procedure whereby any member of the armed forces who believes himself wronged by his commanding officer may make complaint to the officer exercising general court-martial jurisdiction, which officer must examine into the complaint and take such measures for redressing the wrong complained of as the circumstances may justify.

This article is adopted from AW 121. The Navy has provided a similar procedure by regulation.

References: AW 121; United States Navy Regulations, article 99.

Article 139. Redress of injuries to property

This article is a redraft of AW 105 with changes to permit the Secretary of the Department to prescribe the situations and procedures for redress. It is not intended to affect the provisions of 40 Statute 705 (1918) as amended by 41 Statute 132 (1919), 34 United States Code, section 600 (1946), (claims for damages not occasioned by vessels) or the provisions of 28 United States Code, section 2671 et seq. (1948), (tort claims) or similar enactments.

References: AW 105.

Article 140. Delegation by President

This article authorizes the President to delegate his authority under this code and, further, to provide for the subdelegation of such

authority. It incorporates the language of section 10 (c), Public Law 759, Eightieth Congress, second session (June 24, 1948).

The remaining provisions of the proposed legislation are contained in section 2 through section 15. Some provisions of these remaining sections have heretofore been included in either the Articles of War or the Articles for the Government of the Navy. It is considered desirable to preserve these provisions in the statutory law; however, they are not considered to be germane to the provisions of a uniform code of justice. By separating them from section 1, which includes all of the provisions for the Uniform Code of Justice, they will automatically be excluded from the code but preserved as statutory law in an appropriate place in the United States Code.

SECTION 2

This is a savings provision which will preserve the validity of all the remaining articles of this act in the event any article or part thereof should be declared invalid.

SECTION 3

Throughout this act abbreviated titles are used for the various sections, articles and parts. These are known as catch lines and this precludes any inference of a legislative construction being placed on such catch lines.

SECTION 4

This section insures that the prosecution of offenses which are a violation of laws which will be repealed by this act shall be completed under such laws in the same manner and with the same effect as if this act had not been passed.

SECTION 5

This section prescribes the effective date of this act and insures that a period of 12 months will be available to the armed forces for the preparation of a manual to supplement the act. This section also provides that the judges of the Court of Military Appeals may assume office 3 months before the code goes into effect in order that they may organize the court and prepare rules of procedure. Finally, this section provides that section 12, which empowers the Judge Advocate General of any armed force to grant a new trial under certain conditions for offense committed during World War II, will become effective on the date of approval of this act.

SECTION 6

It is considered desirable to retain as statutory provisions the provisions of AW 107, 108, 112, 113, 119, and 120 (41 Stat. 809, 810, 811), but to delete them as provisions of this code. They are not considered germane to a uniform code of justice but are considered appropriate statutory provisions. This section will accomplish the desired result.

SECTION 7

Existing Navy law makes provision for the retention of command authority in the commanding officer of a naval vessel or aircraft when

the crew of such vessel or aircraft have become separated from their vessel or aircraft by means of its wreck, loss, or destruction. This section preserves that authority.

It also preserves the authority of officers of separate marine organizations when embarked on a naval vessel, not a part of the authorized complement thereof, subject only to the paramount authority of the commanding officer of any such vessel.

Subsections (c), (d), and (e) refer to commanders' duties of example and correction, divine service, and reverent behavior. These are provisions which are of historical existence to the Navy and which the Navy desires to retain as statutory provisions.

SECTION 8

This section sets forth a standard form of oath which shall be taken by all persons who enlist in any armed force of the United States.

SECTION 9

This section recognizes the diversity of citizenship which authorizes removal of a civil suit from a State jurisdiction to a Federal jurisdiction. It authorizes the removal of any civil or criminal prosecution from a State to a Federal jurisdiction when a member of the armed forces is a party to such action on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the armed forces thereof, or under the law of war.

SECTION 10

This section provides the authority for the dismissal of officers from the armed forces and prescribes the conditions under which the President may drop an officer from the rolls of any armed force.

SECTION 11

Existing law provides that court-martial cases involving midshipmen shall be reviewed by the convening authority and by the Secretary of the Navy. The system of review which is prescribed in this Code makes it necessary that existing law on this subject be amended to conform to the new review provisions. This section accomplishes that purpose.

SECTION 12

This section prescribes the conditions under which World War II personnel who were convicted of court-martial offenses may be granted a new trial. Such provisions were written into Army and Air Force law in Public Law 759, Eightieth Congress (AW 53, as amended), and the present section merely extends a comparable right to other personnel of the armed forces.

SECTION 13

This section prescribes the qualifications of the judge advocates general. Under existing law, there are no legal qualifications whatso-

ever for the judge advocates general. This section makes it mandatory that the judge advocates general be members of a State or Federal bar and have a prescribed amount of legal experience in the service. In computing the number of years required by this section, it is intended that the years spent in obtaining a legal education shall be excluded.

SECTION 14

This is the general repealer section.

SECTION 15

This section authorizes appropriations to carry out the purposes of the act.

DEPARTMENTAL RECOMMENDATIONS

The Bureau of the Budget has advised that the bill is fully in accord with the program of the President and the former and present Secretaries of Defense endorse this bill as indicated by the attached letters which are made a part of this report.

THE SECRETARY OF DEFENSE,
Washington, February 8, 1949.

Hon. MILLARD E. TYDINGS,
*Chairman, Committee on Armed Services,
United States Senate, Washington, D. C.*

DEAR MR. CHAIRMAN: There is transmitted herewith, on behalf of the National Military Establishment, a draft of a proposed bill to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard and to enact and establish a Uniform Code of Military Justice.

The proposed code is based on a study made by a special committee in this office, of which Prof. Edmund M. Morgan, Jr., of the Harvard Law School was chairman. The code covers both the substantive and procedural law governing military justice and its administration in all the armed forces of the United States and is uniformly applicable in all its parts to the Army, the Navy, the Air Force, and the Coast Guard in time of war and peace.

The proposed code provides the sole statutory authority for—

- (1) The infliction of limited disciplinary penalties for minor offenses without judicial action;
- (2) The establishment of pretrial and trial procedure;
- (3) The creation and constitution of three classes of courts martial corresponding to those now in existence;
- (4) The eligibility of members of each of the courts and the qualifications of its officers and counsel;
- (5) The review of findings and sentence and the creation and constitution of the reviewing tribunals; and
- (6) The listing and definition of offenses, redrafted and rephrased in modern legislative language.

Attention is called to the provisions of the code which are designed to provide for uniformity in the administration of military justice, to those designed to assure the accused a fair trial, to those designed to prevent undue control or interference with the administration of military justice, and to those designed to preserve appropriate military functions.

Among the provisions designed to insure uniformity are the following:

- (1) The offenses made punishable by the code are identical for all armed forces;
- (2) The same system of courts with the same limits of jurisdiction of each court is set up in all the armed forces;
- (3) The procedure for general courts martial is identical as to institution of charges, pretrial investigation, action by the convening authority, review by the Board of Review, and review by the Judicial Council in all the armed forces;
- (4) The rules of procedure at the trial, including modes of proof, are equally applicable to all the armed forces;
- (5) The Judge Advocates General of the three departments are required to make uniform rules of procedure for the Board of Review in each department;

(6) The required qualifications for members of the court, law officer, and counsel are identical for all the armed forces;

(7) The single Judicial Council, which finally decides all questions of law, is the court of last resort for each of the armed forces; and also acts with the Judge Advocates General of the three departments as an advisory body with a view to securing uniformity in policy and in sentences and in discovering and remedying defects in the system and its administration.

Among the provisions designed to insure a fair trial are the following:

General courts martial

(1) A pretrial investigation is provided, at which the accused is entitled to be present with counsel to cross-examine available witnesses against him and to present evidence in his own behalf. It has some features of preliminary hearing and some of pretrial discovery as used in the civil courts.

(2) A prohibition against referring any charge for trial which does not state an offense or is not shown to be supported by sufficient evidence.

(3) A mandatory provision for competent, legally trained counsel at the trial for both the prosecution and the defense.

(4) A prohibition against requesting any statement from the accused without warning, and against compelling self-incrimination, and against reception in evidence of improperly obtained statements.

(5) Provision for equal process to accused and prosecution for obtaining witnesses and depositions and a provision allowing only the accused to use depositions in a capital case.

(6) A provision giving an accused enlisted man the privilege of having enlisted men as members of the court trying his case.

(7) A provision whereby voting on challenges, findings, and sentence is by secret ballot of the members of the court.

(8) A provision requiring the law officer to instruct the court on the record concerning the elements of the offense, presumption of innocence, and the burden of proof.

(9) A provision for an automatic review of the trial record for errors of law and of fact by a Board of Review with the right of the accused to be represented by legally competent counsel.

(10) A provision for the review of the record for errors of law by the Judicial Council. This review is automatic in the case where the sentence is death or affects a general officer and is upon petition showing probable error of law where the sentence involves more than 1 year's confinement, with the right to be represented by competent counsel.

(11) A prohibition against receiving pleas of guilty in capital cases.

Special courts martial

In addition to certain of the above provisions which also apply to special courts martial, there is provided as follows:

(1) The trial counsel and defense counsel must be equally qualified.

(2) In cases where a bad-conduct discharge has been imposed, a full stenographic transcript must be taken and the case is reviewed in the same fashion as a general court-martial record.

(3) Peremptory challenge and voting by secret ballot is provided as in a general court martial.

(4) Review by judge advocate or legal officer is required.

Summary courts martial

(1) Provision is made for permitting an accused to refuse trial by summary court upon request.

(2) Review by a judge advocate or legal officer is required.

Among some of the provisions designed to prevent interference with the due administration of justice are the following:

(1) Provision is made for permitting an accused to refuse trial by summary court upon request.

(2) The staff judge advocate or legal officer is authorized to communicate directly with the Judge Advocate General.

(3) All counsel at a general court-martial trial are required to be lawyers and to be certified by the Judge Advocate General as qualified to perform their legal duties.

(4) The law officer—a competent lawyer—rules on all questions raised at the trial, except on a motion for a directed verdict and on the issue of the accused's sanity.

(5) The convening authority must not act on a finding or sentence of a general court martial without first obtaining the advice of his staff judge advocate or legal officer.

(6) The Board of Review, situated in the office of the Judge Advocate General and removed from the convening authority, is composed of legally trained men and reviews the trial record for errors of law and of fact.

(7) The Judicial Council is composed of civilians and passes finally on all questions of law.

(8) When counsel appear before the Board of Review and the Judicial Council, both parties must be represented by qualified lawyers.

(9) Censure by a commanding officer of a court martial or any member or officer thereof because of any judicial action of the court or any member or officer is forbidden and any attempt improperly to influence official action in any aspect of a trial or its review is prohibited.

Elements of command

Among the command functions which are found in the present Articles of War and Articles for the Government of the Navy, the following provisions have been retained:

(1) Commanding officers refer the charges in general, special and summary courts martial and convene the courts.

(2) Commanding officers appoint the members of the courts.

(3) Commanding officers appoint the law officer and counsel for the trial.

(4) Commanding officers retain full power to set aside findings of guilty and to modify or change the sentence, but are not permitted to interfere with verdicts of not guilty nor to increase the severity of the sentence imposed.

(5) The powers of commanding officers at mast and company punishment are retained for minor offenses which require prompt action and for which comparatively light punishments can be imposed. The procedural safeguards in this type of nonjudicial punishment are considerably less than in the courts martial, but are believed to be reasonably adequate.

I regard this proposed bill as an outstanding example of unification in the armed services. In my opinion, the proposed bill is well-designed to protect the rights of those subject to it, will increase public confidence in military justice, and will not impair the performance of military functions. Accordingly, I strongly urge its passage by the Congress.

The Bureau of the Budget has advised me that the proposed bill is fully in accord with the program of the President.

Sincerely yours,

JAMES FORRESTAL.

THE SECRETARY OF DEFENSE,
Washington, June 8, 1949.

HON. MILLARD E. TYDINGS,
United States Senate.

DEAR SENATOR TYDINGS: As you know, I requested Prof. Edmund M. Morgan to inform your committee of my support of the Uniform Code of Military Justice when he appeared before you on my behalf.

I would appreciate it if this letter is incorporated in the record of your hearings and the committee report, because I am anxious to reiterate my strong support of the Uniform Code.

The Code was drafted and transmitted to the Congress before I assumed office. I have taken the time, however, to familiarize myself with its principal provisions and I concur in Mr. Forrestal's opinion that the Code represents an outstanding example of unification in the armed services. In my opinion, the Code provides a number of very desirable protections for the accused without interfering with necessary military functions. In addition it represents a great advance in military justice in that it provides the same law and the same procedures for all persons in the armed forces. By its terms, the same rights, privileges, and obligations will apply to Army, Navy, Air Force, and Coast Guard. I cannot emphasize too much the importance of this equality and the fact that I believe it will be an item which will enhance the teamwork and cooperative spirit of the services.

I am aware of the conscientious and objective work of your committee and the House committee. I know that the bill has been

improved by these constructive efforts and I wish to express to you and the members of your committee my deep appreciation. In order that the benefits of the Code may be available at the earliest possible time, I strongly urge its passage at the present session of the Congress.

With kindest personal regards, I am,

Sincerely yours,

LOUIS JOHNSON.

CROSS-REFERENCE TABLE

ARTICLES OF WAR TO RELATED ARTICLES IN THE UNIFORM CODE OF MILITARY JUSTICE

AW	UCMJ	AW	UCMJ
Art. 1.....	1.	Art. 50g.....	66.
2 (a).....	2 (1).	50h.....	76.
2 (b).....	2 (2).	51a.....	71, 74.
2 (c).....	2 (1), 17.	51b.....	71, 72, 74.
2 (d).....	2 (10), 2 (11).	52.....	63, 66 (d), 67 (e).
2 (e).....	2 (7).	53.....	73, 75.
2 (f).....	2 (4), 2 (5).	54.....	83.
3.....	16.	55.....	84.
4.....	25.	56.....	107.
5.....	16.	57.....	107.
6.....	16.	58.....	85.
7.....	16.	59.....	77.
8.....	22, 26.	60.....	78.
9.....	23.	61.....	86, 87.
10.....	24.	62.....	88.
11.....	27, 35 (b), 6 (c).	63.....	89.
12.....	18.	64.....	90.
13.....	19.	65.....	91.
14.....	20.	66.....	94.
15.....	21.	67.....	94.
16.....	25 (c), 25 (d), 12, 13.	68.....	7, 95.
17.....	38.	69.....	10, 95.
18.....	11.	70.....	10, 98 (1).
19.....	42.	71.....	11.
20.....	40.	72.....	11.
21.....	45.	73.....	96.
22.....	46.	74.....	14.
23.....	47.	75.....	99.
24.....	31.	76.....	100.
25.....	49.	77.....	101.
26.....	49.	78.....	102.
27.....	50.	79.....	103.
28.....	85.	80.....	103.
29.....	53.	81.....	104.
30.....	39.	82.....	106.
31.....	51.	83.....	108.
32.....	48.	84.....	108.
33.....	54 (a).	85.....	112.
34.....	54 (b).	86.....	113.
35.....	60, 61, 65 (a).	87.....	Deleted.
36.....	65.	88.....	37.
37.....	59 (a).	89.....	109, 116, 139.
37.....	64, 58 (b).	90.....	117.
38.....	36.	91.....	114.
39.....	43.	92.....	118, 120.
40.....	44, 62.	93.....	119, 121-131.
41.....	55.	94.....	132.
42.....	58 (a).	95.....	133.
43.....	52.	96.....	134.
44.....	71 (b).	97-103.....	135.
45.....	56, 58 (a).	104.....	15.
46a.....	30.	105.....	139.
46b.....	32.	106.....	8.
46c.....	33, 35.	107.....	(1).
47a.....	6.	108.....	(1).
47b.....	34.	109.....	(2).
47c.....	61, 65 (b).	110.....	137.
47d.....	71.	111.....	54 (c).
47e.....	69.	112.....	(1).
47f.....	64.	113.....	(1).
48.....	71.	114.....	136.
49.....	71.	115.....	28.
50a.....	66, 67.	116.....	38.
50b.....	66, 68.	117.....	(2).
50c.....	68.	118.....	(2).
50d.....	66, 67, 71.	119.....	(1).
50e.....	66, 67, 71.	120.....	(1).
50f.....	69.	121.....	138.

¹ Text of article not repealed. See sec. 6 of bill.

² Uniform provision for all services enacted. See secs. 8, 9, and 10 of bill.

CROSS REFERENCE TABLE

ARTICLES FOR THE GOVERNMENT OF THE NAVY TO RELATED ARTICLES IN THE
UNIFORM CODE OF MILITARY JUSTICE

AGN	UCMJ	AGN	UCMJ
Art. 1.....	(1).	Art. 15.....	Repealed by act of Mar. 3, 1899.
2.....	(2).	16.....	103.
3.....	(3).	17.....	93.
4 (1st).....	94.	18.....	Deleted.
4 (2nd).....	90, 91, 92.	19.....	84.
4 (3rd).....	90, 91.	20.....	To be covered by regulations.
4 (4th).....	104.	21.....	(1).
4 (5th).....	104.	22 (a).....	134.
4 (6th).....	85.	22 (b).....	83.
4 (7th).....	85, 99.	23.....	5.
4 (8th).....	113.	24-25.....	15.
4 (9th).....	86, 113.	26.....	23.
4 (10th).....	110 (a).	27.....	16.
4 (11th).....	109.	28.....	42 (a).
4 (12th).....	99 (2), 100.	29.....	42 (b).
4 (13th).....	99 (5).	30-31.....	19.
4 (14th).....	99 (1).	33.....	71 (d), 74.
4 (15th).....	85.	34.....	54, 65.
4 (16th).....	99 (3).	35.....	18.
4 (17th).....	99 (3).	36.....	(2).
4 (18th).....	99 (5).	37.....	4.
4 (19th).....	99 (8).	38.....	22.
4 (20th).....	99 (9).	39.....	16.
5.....	106.	40.....	42.
6.....	118.	41.....	42.
7.....	58.	42.....	46, 47, 48.
8 (1st).....	134.	43.....	10, 30, 35.
8 (2nd).....	93.	44.....	Deleted.
8 (3rd).....	117.	45.....	40.
8 (4th).....	77, 117.	46.....	29.
8 (5th).....	114.	47.....	29.
8 (6th).....	89, 91.	48.....	18.
8 (7th).....	81, 89, 91.	49.....	55.
8 (8th).....	80, 94.	50.....	52.
8 (9th).....	92 (2).	51.....	Deleted.
8 (10th).....	108 (3).	52.....	54.
8 (11th).....	110 (b).	53.....	71.
8 (12th).....	92 (3), 93, 127.	54 (a).....	64, 66, 71, 74.
8 (13th).....	Deleted.	54 (b).....	74.
8 (14th).....	107.	55-60.....	135.
8 (15th).....	108.	61-62.....	43.
8 (16th).....	103 (3).	63.....	56.
8 (17th).....	78.	64 (a).....	24.
8 (18th).....	11, 98 (2).	64 (b).....	10, 20.
8 (19th).....	86, 87.	64 (c).....	28.
8 (20th).....	92.	64 (d).....	64, 65.
8 (21st).....	85.	64 (e).....	36.
8 (22d).....	78, 85.	64 (f).....	54, 65.
9.....	71 (b).	64 (g).....	20.
10.....	85.	65.....	2, 25.
11.....	108, 121.	66.....	15, 22, 23, 24.
12.....	Deleted.	67.....	(1).
13.....	Deleted.	68.....	49.
14.....	132.	69.....	136.

¹ Similar provision enacted in sec. 7 of bill.² Uniform provision for all services enacted. See sec. 10 of bill.